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Nos. 85-971, 85-972

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY,
Petitioner,

v.

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

SECURITY PACIFIC NATIONAL BANK,
Petitioner,

v.

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER SECURITY PACIFIC NATIONAL BANK

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QUESTIONS PRESENTED

To preserve the competitive equality of national banks and state banks, the McFadden Act allows national banks to establish "branches," defined "to include any . . . office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent," but only in a bank's home state and only to the extent allowed by that state's laws governing the location of state bank branches. 12 U.S.C. § 36(c), (f). The operation of other national bank facilities not within this definition, however, is not similarly restricted. In the case at bar, a divided court of appeals, overturning a ruling by the Comptroller of the Currency ("Comptroller"), held that national bank discount brokerage offices not engaged in receiving deposits, paying checks, or lending money are nevertheless branches and therefore could be operated only in the bank's home state and only at its main office and branches. Further, the court held that an organization of non-banks has standing to seek enforcement of the McFadden Act's branching restrictions. Thus, the questions presented are:

(1) Did the Comptroller act lawfully in ruling that a national bank may establish an interstate discount brokerage operation without violating the branch banking restrictions of the McFadden Act?

(2) Does an association having no connection with national or state banks fall outside the zone of interests the McFadden Act was intended to protect and therefore lack standing to seek enforcement of the Act?

PARTIES TO THE PROCEEDINGS

Petitioner in No. 85-971 is Robert L. Clarke, Comptroller of the Currency of the United States. Petitioner in No. 85-972 is Security Pacific National Bank, an intervenor below.* Respondent in both cases is the Securities Industry Association, a trade association of non-bank securities brokers, dealers, and underwriters.

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* As required by Rule 28.1 of this Court, petitioner Security Pacific National Bank states that its parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates consist of Security Pacific Corporation, Century Credit Corporation, Hoare Govett Ltd., Security Pacific Bank S.A., Tricontinental Holdings Ltd., Marac Holdings Ltd., Guaranty Trust Ltd., Caixa Leasing S.A., Security Pacific Leasing S.A., TMG Investment Pte. Ltd., Pan Pacific Ventures, Inc., SECPRO S.A., SPAL Management Ltd., Atlantic Century Advisors, Inc., Munder Capital Management, Inc. and Hong Kong & Shanghai Insurance Co., Ltd.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
A. The Comptroller's Approval Of Security Pacific's Application	5
B. District Court Proceedings	7
C. Appellate Proceedings	8
SUMMARY OF ARGUMENT	9
ARGUMENT	13
I. THE COMPTROLLER'S RULING THAT THE McFADDEN ACT'S DEFINITION OF "BRANCH" DOES NOT REACH DISCOUNT BROKERAGE OFFICES SHOULD BE UPHELD	14
A. Under The Plain Language Of The Statute, Discount Brokerage Offices Are Not Branches	15
B. All Relevant Criteria Indicate That The Comptroller's Interpretation Was Reasonable	19

TABLE OF CONTENTS—Continued

Page

1. Statutory Language And Legislative History 20
2. Judicial Precedents 28
3. Prior Administrative Decisions 30

C. The Interpretation Substituted By The Lower Courts Is Untenable 32

II. THE COURTS BELOW FAILED TO APPLY THE ZONE-OF-INTERESTS STANDING REQUIREMENT, THEREBY ALLOWING SIA TO OBTAIN COMPETITIVE ADVANTAGES CONGRESS NEVER INTENDED 34

CONCLUSION 39

TABLE OF AUTHORITIES

CASES: Page

Allen v. Wright, 104 S. Ct. 3315 (1984) 34
Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970) 37
Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970) 34, 35, 37
Bank Stationers Association v. Board of Governors, 704 F.2d 1233 (11th Cir. 1983) 36
Barlow v. Collins, 397 U.S. 159 (1970) 37
Bender v. Williamsport Area School District, 106 S. Ct. 1326 (1986) 34
Block v. The Pennsylvania Exchange Bank, 253 N.Y. 227 (1930) 22
Board of Governors v. Agnew, 329 U.S. 441 (1947) 20
Board of Governors v. Dimension Financial Corp., 106 S. Ct. 681 (1986) 12, 16, 17
Bob Jones University v. United States, 461 U.S. 574 (1983) 11, 27
Branch Bank & Trust Co. v. National Credit Union Administration Board, 786 F.2d 621 (4th Cir. 1986) 35, 37
Bread Political Action Committee v. Federal Election Commission, 455 U.S. 577 (1982) 15, 17, 19
Central National Bank v. White, 139 N.Y. 631 (1983) 22
Chemical Manufacturers Association v. Natural Resources Defense Council, Inc., 105 S. Ct. 1102 (1985) 20
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 10, 14, 15, 16, 19, 20
Colorado ex rel. State Banking Board v. First National Bank of Fort Collins, 540 F.2d 497 (10th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977) 29
Consumer Product Safety Commission v. GTE Sylvania Inc., 447 U.S. 102 (1980) 15, 15-16, 19
Continental Illinois National Bank & Trust Co. v. Lignoul, No. 76-C-2209, slip op. (N.D. Ill. Nov. 9, 1976) 18, 32
Control Data Corp. v. Baldrige, 655 F.2d 283 (D.C. Cir.), *cert. denied*, 454 U.S. 881 (1981) 37

TABLE OF AUTHORITIES—Continued

Page

Copper & Brass Fabricators Council, Inc. v. Department of the Treasury, 679 F.2d 951 (D.C. Cir. 1982) 36
Federal Trade Commission v. Sun Oil Co., 371 U.S. 505 (1963) 19
First Bank & Trust Co. v. Smith, 545 F.2d 752 (1st Cir. 1976), *cert. denied*, 430 U.S. 931 (1977) 38
First-Citizens Bank & Trust Co. v. Camp, 409 F.2d 1086 (4th Cir. 1969) 38
First National Bank in Plant City v. Dickinson, 396 U.S. 122 (1969) 11, 13, 14, 17, 20, 28-29, 33
First National Bank in St. Louis v. Missouri, 263 U.S. 640 (1924) 13, 23
First National Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252 (1966) 13, 14, 21, 36
Glass Packaging Institute v. Regan, 737 F.2d 1083 (D.C. Cir.), *cert. denied*, 105 S. Ct. 509 (1984) 8, 35-36
Haig v. Agee, 453 U.S. 280 (1981) 27
Heckler v. Mathews, 465 U.S. 728 (1984) 17
Hempstead Bank v. Smith, 540 F.2d 57 (2d Cir. 1976) 38
Independent Bankers Association of America v. Heimann, 627 F.2d 486 (D.C. Cir. 1980) 29
Independent Bankers Association of America v. Smith, 534 F.2d 921 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976) 14, 29, 30
Independent Bankers Association of New York State, Inc. v. Marine Midland Bank, 757 F.2d 453 (2d Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3007 (U.S. June 27, 1985) (No. 84-2023) 29
Jackson v. First National Bank of Gainesville, 430 F.2d 1200 (5th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971) 28, 29
Leaf Tobacco Exporters Association v. Block, 749 F.2d 1106 (4th Cir. 1984) 35, 36
Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980) 5

TABLE OF AUTHORITIES—Continued

	Page
Merchants National Bank of Boston v. State National Bank of Boston, 77 U.S. (10 Wall.) 604 (1871)	23
North Dakota v. United States, 460 U.S. 300 (1983)	15
Ohio Bank & Savings Co. v. Tri-County National Bank, 411 F.2d 801 (6th Cir. 1969)	38
Quern v. Mandley, 436 U.S. 725 (1978)	17
R.T. Vanderbilt Co. v. Occupational Safety & Health Review Commission, 708 F.2d 570 (11th Cir. 1983)	36, 37
Russello v. United States, 464 U.S. 16 (1983)	18-19
Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974)	35
Securities Industry Association v. Board of Governors, 468 U.S. 207 (1984)	4, 8, 11, 12, 20, 26, 30
Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976)	35
Springfield State Bank v. National State Bank of Elizabeth, 459 F.2d 712 (3d Cir. 1972)	38
St. Louis County National Bank v. Mercantile Trust Co., 548 F.2d 716 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977)	6, 29, 33
State Bank of Fargo v. Merchants National Bank & Trust Co., 593 F.2d 341 (8th Cir. 1979)	38
State Bank of Rensselaer v. Heimann, 619 F.2d 679 (7th Cir. 1980)	38
Tax Analysts & Advocates v. Blumenthal, 566 F.2d 130 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978)	38
United States v. Albertini, 105 S. Ct. 2897 1985)	10, 17
United States v. Riverside Bayview Homes, Inc., 106 S. Ct. 455 (1985)	19-20, 20
United States v. Rutherford, 442 U.S. 544 (1979)	27
United States v. Shimer, 367 U.S. 374 (1961)	20
United States v. Wong Kim Bo, 472 F.2d 720 (5th Cir. 1972)	19
Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982)	34

TABLE OF AUTHORITIES—Continued

	Page
Zenith Radio Corp. v. United States, 437 U.S. 443 (1978)	32
CONSTITUTION, FEDERAL STATUTES, AND REGULATIONS:	
United States Constitution, art. III, § 2, cl. 1	3
Banking Act of 1933 (Glass-Steagall Act), ch. 89, 48 Stat. 162	
§ 20	26
§ 23	27
Bank Holding Company Act of 1956	4-5
12 U.S.C. § 1841(c) (1982)	5
12 U.S.C. § 1842(d) (1982)	5
Bank Service Corporation Act, 12 U.S.C. § 1864 (1982)	37
National Bank Act Amendments of 1927 (McFadden Act), ch. 191, 44 Stat. 1224	13
§ 2(b)	18, 24
§ 7(c)	27
§ 7(g)	18
National Bank Act of 1864, ch. 106, § 8, 13 Stat. 100	20
12 U.S.C. § 24 (Seventh) (Supp. II 1984)	5, 18, 30
12 U.S.C. § 36(c) (1982)	14
12 U.S.C. § 36(f) (1982)	*passim*
12 U.S.C. § 36(g) (1982)	18
12 U.S.C. § 81 (1982)	3, 23
12 U.S.C. § 377 (1982)	26
28 U.S.C. § 1254(1) (1982)	2
Rev. Stat. 5190	20, 23
Fed. R. App. P. 41(b)	9
12 C.F.R. § 7.7380 (1985)	31
LEGISLATIVE MATERIALS:	
Foreign Bank Act of 1975: Hearings on S. 958 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. (1976)	31

TABLE OF AUTHORITIES—Continued

Page

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International Banking Act of 1977: Hearings on H.R. 7325 Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs, 95th Cong., 1st Sess. (1977) .. 31
Operation of the National and Federal Reserve Banking Systems: Hearings on S. Res. 71 Before a Subcomm. of the Senate Comm. on Banking and Currency, 71st Cong., 3d Sess. (1931) ..23, 25-26, 26
H.R. Rep. No. 83, 69th Cong., 1st Sess. (1926) 22, 24
S. Rep. No. 473, 69th Cong., 1st Sess. (1926) 11, 18, 24
S. Rep. No. 1073, 95th Cong., 2d Sess. (1978) 27
66 Cong. Rec. 1627 (1925) 22
66 Cong. Rec. 4432 (1925) 21
66 Cong. Rec. 4433 (1925) 22
66 Cong. Rec. 4527 (1925) 36
67 Cong. Rec. 2828 (1926) 18
67 Cong. Rec. 2829 (1926) 17
67 Cong. Rec. 2832 (1926) 17, 21
67 Cong. Rec. 2839 (1926) 21
67 Cong. Rec. 2844 (1926) 22
67 Cong. Rec. 2855 (1926) 22
67 Cong. Rec. 2856 (1926) 21
67 Cong. Rec. 2860 (1926) 22
67 Cong. Rec. 8351 (1926) 25
68 Cong. Rec. 5815 (1927) 21
68 Cong. Rec. 5816 (1927) 16
122 Cong. Rec. 24,403 (1976) 28
124 Cong. Rec. 9095 (1978) 28

MISCELLANEOUS:

Annual Report of the Comptroller of the Currency (1926) 21
V. Carosso, *Investment Banking in America* (1970) 23, 24

TABLE OF AUTHORITIES—Continued

Page

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Department of the Treasury, *Geographic Restrictions on Commercial Banking in the United States: The Report of the President* (1981) 31
Glidden, *The Regulation of National Banks' Subsidiaries*, 40 Bus. Law. 1299 (1985) 31
Lowry National Bank, 29 Op. Att'y Gen. 81 (1911) .. 23
Osterweis, *Security Affiliates and Security Operations of Commercial Banks*, Harv. Bus. Rev., Oct. 1932, at 124 26
W. Peach, *The Security Affiliates of National Banks* (1941) 23, 24, 25
Perkins, *The Divorce of Commercial and Investment Banking: A History*, 88 Banking L.J. 483 (1971) 23, 24
SEC Form B-D (Broker-Dealer Registration Statements) 5
Wigder & Rigler, *Banks and the Discount Brokerage Business*, 18 Rev. Sec. & Commodities Reg. 81 (1985) 4

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BRIEF FOR PETITIONER SECURITY PACIFIC NATIONAL BANK

OPINIONS BELOW

The *per curiam* opinion of the United States Court of Appeals for the District of Columbia Circuit and an opinion dissenting therefrom are reported at 758 F.2d 739 (D.C. Cir. 1985), and are reprinted in Appendix ("App.") A to the Petition of Security Pacific National Bank for a Writ of Certiorari (1a).[1] The District

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[1] The Solicitor General has filed a consent motion seeking leave of this Court to dispense with the filing of a joint appendix. Relevant

Court's decision is reported at 577 F. Supp. 252 (D.D.C. 1983), and is reprinted as App. B (4a). The decision of the Comptroller of the Currency approving Security Pacific National Bank's application to establish a discount brokerage subsidiary is reported at [1982-1983 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 99,284 (Aug. 26, 1982), and is reprinted as App. C (22a). The court of appeals order denying the suggestions for rehearing *en banc*, along with the dissenting opinion of three judges, is reported at 765 F.2d 1196 (D.C. Cir. 1985), and is reprinted as App. E (38a).

JURISDICTION

The opinion of the United States Court of Appeals for the District of Columbia Circuit was entered on April 12, 1985. Petitioners' suggestions for rehearing *en banc* were denied on July 12, 1985. On October 1, 1985, the Chief Justice entered an order extending petitioners' time for filing petitions for writs of certiorari to November 9, 1985. On November 6, 1985, the Chief Justice signed an order further extending petitioners' time for filing to December 9, 1985. The petitions for writs of certiorari were filed on that date and were granted on March 3, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

12 U.S.C. § 36(c) (1982):

> A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said associa-

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opinions and other portions of the record below were included in the Appendices to the Petition of Security Pacific National Bank for a Writ of Certiorari filed on December 9, 1985. Citations to material printed in that Appendix appear as "—— a."

tion is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. . . .

12 U.S.C. § 36(f) (1982):

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

12 U.S.C. § 81 (1982):

> The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title.

United States Constitution, art. III, § 2, cl. 1:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;— between Citizens of different States;—between Citizens of the same State

claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

In 1975, various aspects of the securities brokerage industry were deregulated, prompting banking institutions to consider expanded entry into that market.[2] *See generally* Wigder & Rigler, *Banks and the Discount Brokerage Business*, 18 Rev. Sec. & Commodities Reg. 81 (1985). In response to increased brokerage activity by banking institutions, respondent Securities Industry Association ("SIA"), a trade association of non-bank securities firms, has mounted a multi-pronged effort to block competition from the banking industry. In 1983, SIA filed a lawsuit contending that bank holding companies were not authorized by Congress to engage in discount brokerage, a challenge this Court ultimately rejected less than two years ago in *Securities Industry Association v. Board of Governors* (*"Schwab"*), 468 U.S. 207, 221 (1984).[3] Notwithstanding that defeat, SIA seeks in this litigation to prevent national banks (as distinct from bank holding companies) from entering the interstate discount brokerage market. As explained more fully below, SIA urges that the McFadden Act's branching restrictions should be applied to national bank discount brokerage operations, allowing each national bank to maintain discount brokerage offices only in its home state at its main office and branches. In short, if SIA prevails here, national banks would be prevented from establishing discount brokerage offices on an interstate basis.[4]

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[2] Securities brokerage involves the purchase and sale of securities for third parties.

[3] "Full-service" brokers provide investment advice in conjunction with brokerage; "discount brokers," who charge a lower commission, generally do not. Many of SIA's members are full-service brokers.

[4] Because discount brokerage affiliates of bank holding companies are not "banks" as defined by the Bank Holding Company Act of

A. The Comptroller's Approval Of Security Pacific's Application.

On July 2, 1982, petitioner Security Pacific National Bank ("Security Pacific") filed an application with the Comptroller of the Currency ("Comptroller") to establish a wholly-owned operating subsidiary ("Discount Brokerage") that would purchase securities for customers at rates much lower than those of full-service competitors. Security Pacific proposed to offer such services not only at its branch banks in its home state of California but also at other locations both inside and outside that state.

On August 26, 1982, the Comptroller issued a decision approving Security Pacific's application. (22a.) The Comptroller first concluded that the Glass-Steagall Act, particularly 12 U.S.C. § 24 (Seventh), provided "clear authorization for banks and . . . their operating subsidiaries . . . to engage in the activities contemplated for Discount Brokerage." (23a.) The Comptroller then separately examined whether, under the McFadden Act, the discount brokerage offices would constitute "branches" that could be located only within Security Pacific's home state at the bank's main office and existing branch banks. (29a-35a). Noting that the Act defines "branch" to include a facility at which "deposits are received, or checks paid, or money lent," *see* 12 U.S.C. § 36(f) (1982), the Comp-

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1956, *see* 12 U.S.C. § 1841(c) (1982), they are not subject to that Act's limitations on interstate banking. *See Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 47-48 & n.13 (1980) (interpreting 12 U.S.C. § 1842(d)). As a result, some discount brokerage affiliates of bank holding companies are now operating numerous offices nationwide. For example, as of December 31, 1985, BankAmerica Corporation's Charles Schwab & Company subsidiary had 90 discount brokerage offices in 29 states, the District of Columbia, and Hong Kong. *See* SEC Form B-D, Schedule E (Broker-Dealer Registration Statements). For some banking institutions, however, conducting discount brokerage activities through a national bank (as opposed to a bank holding company) has distinct advantages. This is particularly true for small and medium-size national banks for which the costs of establishing a holding company may be prohibitive.

troller concluded that the discount brokerage firms would perform none of these functions.

Although this conclusion would have sufficed to establish that Security Pacific's operation of these offices away from its main office and branches would not violate the Act, the Comptroller also concluded that even under arguable alternative readings of Section 36(f), the offices "could [not] be found . . . to be branches within the meaning of the McFadden Act." (33a) (citing *St. Louis County National Bank v. Mercantile Trust Co.*, 548 F.2d 716 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977)). He further observed that it would be inconsistent with settled practice in the banking industry to find that offices conducting brokerage activities are within the McFadden Act's branch definition because a substantial "number of banks currently operat[e] [similar] U.S. government or municipal securities dealer offices that transact business with the public at non-branch locations on both an intrastate and interstate basis." (34a.) The Comptroller thereupon determined that "the activities of Discount Brokerage, viewed individually or collectively, . . . [did] not . . . constitute branch banking for purposes of the McFadden Act" and that Discount Brokerage's offices therefore could be established on an interstate basis. (35a.)[5]

Relying on the Comptroller's approval, Discount Brokerage has established twenty offices (including eighteen in nine states outside California) and presently maintains approximately 245,000 customer accounts (about 155,000 of which are held by persons residing outside California). Approximately sixty other national banks

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[5] A month later, the Comptroller approved the application of Union Planters National Bank of Memphis ("Union Planters") to acquire an existing discount brokerage firm. (*See* App. D, 37a.)

have applied to create or acquire similar discount brokerage subsidiaries.

B. District Court Proceedings.

On October 6, 1982, SIA, a trade association of nonbank securities firms competing with Discount Brokerage, filed this action challenging the Comptroller's approval of the Security Pacific application.[6] SIA urged reversal of the Comptroller's action on the grounds that (1) the Glass-Steagall Act prohibits national bank subsidiaries from offering discount brokerage services at all and (2) in any event the McFadden Act prohibits Security Pacific from offering brokerage services at any location away from its main office and branches in California. On cross-motions for summary judgment, the United States District Court for the District of Columbia (Hon. Thomas A. Flannery) upheld the Comptroller's Glass-Steagall Act ruling. 577 F. Supp. at 254-57 (8a-14a). However, the court reversed the Comptroller's McFadden Act decision. *Id.* at 257-60 (14a-21a). The court first held that SIA had standing to seek enforcement of the Act's branching provisions, essentially finding that since SIA's members could be injured by the Comptroller's ruling, they are ipso facto within the zone of interests the Act was intended to protect. *Id.* at 258-259 (15a-17a). Then, concluding that a national bank facility performing any function which "national banks may conduct at their main office" is a "branch" under the Act, *id.* at 260 (20a), and finding that brokerage activities could as a physical matter be housed at a bank's main office, the court invalidated the Comptroller's approval to the extent that it authorized establishment of brokerage offices at any location outside California and at "unchartered locations" (*i.e.*, non-branch locations) in California. (App. F, 44a.)

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[6] SIA also challenged the Comptroller's approval of the Union Planters application. *See supra* at 6 n.5.

C. Appellate Proceedings.

The parties cross-appealed to the United States Court of Appeals for the District of Columbia Circuit, but briefing was deferred because the Glass-Steagall Act issue closely resembled a question then pending before this Court in *Schwab*. After this Court held in *Schwab* that bank holding company affiliates are authorized by the Glass-Steagall Act to provide discount brokerage services, 468 U.S. at 221, the court of appeals issued a two-sentence *per curiam* opinion affirming the district court's conclusions "generally for the reasons stated in its Memorandum Opinion." 758 F.2d at 740 (2a). On the Glass-Steagall Act issue, the court of appeals was unanimous, noting that the district court ruling had "receive[d] substantial support" from *Schwab*.[7] *Id.* On the McFadden Act issue, however, the court divided. The majority affirmed without comment, but Judge Scalia dissented, stating that the district court's standing analysis had improperly "conflate[d] the constitutional requirement of injury in fact and the separate requirement that 'Congress [have] intended to place the plaintiffs within the zone of interests protected or regulated by the statute.'" *Id.* (3a) (quoting *Glass Packaging Institute v. Regan*, 737 F.2d 1083, 1090 (D.C. Cir.), *cert. denied*, 105 S. Ct. 509 (1984)). Further, Judge Scalia concluded that SIA lacked standing because only "state banks and possibly federal banks, but not all businesses injured in fact, . . . are within the zone of interests protected by the [Act's] branch banking restrictions." 758 F.2d at 740 (3a).

Security Pacific subsequently intervened and joined the Comptroller in seeking rehearing of the McFadden Act issue. On July 12, 1985, the court of appeals, voting 5-3, denied the suggestions for rehearing *en banc*. 765

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[7] This Court denied SIA's petition for a writ of certiorari as to the Glass-Steagall Act ruling. *See Securities Indus. Ass'n v. Comptroller of the Currency*, 106 S. Ct. 790 (1986).

F.2d at 1196 (38a-39a). Judges Scalia, Bork and Starr, however, issued a vigorous dissent, stating that the majority's standing analysis improperly "discard[ed] the zone [of interests] test entirely." *Id.* at 1197 (41a). Further, the dissenters urged that the majority's view of the McFadden Act was "mistaken" and that the Comptroller's interpretation of the statute should have been upheld because it "cannot by any means be considered unreasonable." *Id.* at 1197-98 (41a-42a).

Discount Brokerage has continued to operate its non-branch offices both inside and outside of California pursuant to a stay issued by the district court. On July 25, 1985, SIA moved the court of appeals for an injunction that would have shut Discount Brokerage's eighteen offices outside of California, disrupting service of thousands of out-of-state accounts. On August 2, 1985, however, SIA's motion was denied. The court of appeals stayed issuance of its mandate pending the filing of a petition for writ of certiorari, and pursuant to Fed. R. App. P. 41(b), it remains stayed.

On December 9, 1985, the Comptroller and Security Pacific separately petitioned for writs of certiorari. On March 3, 1986, both petitions were granted, and the cases were consolidated. *See* 106 S. Ct. 1259 (1986).

SUMMARY OF ARGUMENT

This Court should uphold the Comptroller's ruling that national bank-operated discount brokerage offices are not branches under the McFadden Act (defining "branches" to be facilities "at which deposits are received, or checks paid, or money lent"), 12 U.S.C. § 36(f) (1982), and that such offices may therefore be established on an interstate basis. The lower courts' nullification of that decision at the behest of SIA, a group of non-bank securities firms seeking to insulate themselves from national bank competition, is erroneous because the Comp-

troller's decision was compelled by the plain language of Section 36(f) and, in any event, was not unreasonable.

If an agency's interpretation of a statute committed to its administration conforms to the law's "plain language" and there is no clearly expressed legislative intention to the contrary, a court should uphold that interpretation without further analysis. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). The Comptroller's view that Section 36(f) encompasses only those facilities engaged in receiving deposits, paying checks, or lending money was found by the lower courts to constitute the "literal reading of the statute." 577 F. Supp. at 259 (18a). Nevertheless, by adding language to Section 36(f) and thereby broadening its scope, the courts declared Security Pacific's discount brokerage offices to be branches even though they perform none of the functions enumerated in Section 36(f). Since the courts below identified no evidence of legislative intent in derogation of the statute's plain language, this rewriting of the statute was improper, *see, e.g., United States v. Albertini*, 105 S. Ct. 2897, 2902 (1985), and the Comptroller's decision should have been upheld.

Even if Section 36(f) were susceptible to more than one interpretation, the Comptroller's statutory exegesis was in all respects reasonable and therefore still should have been sustained. *Chevron*, 467 U.S. at 843-44. Not only is the Comptroller's decision amply justified by the language of Section 36(f), but it is also supported by all other indicia relevant to the narrow judicial review that should be afforded agency statutory interpretation.

First, the legislative history provides strong grounds for the Comptroller's decision. Congress enacted the McFadden Act in 1927 to preserve the "competitive equality" of national and state banks in their ability to operate branch banks. In so doing, Congress' sole concern was with banking activity (*i.e.*, the provision of money

and credit and the acceptance of deposits). Nowhere in the Act's three-year legislative history is it suggested that Section 36 was intended to limit the then long-standing authorization for national banks to engage in non-banking functions at locations away from their main offices. Moreover, before the McFadden Act was passed, national banks commonly operated brokerage offices on an interstate basis. Section 2(b) of the McFadden Act, enacted simultaneously with Section 36, was intended to "affirm . . . the existence of [this] type of business." S. Rep. No. 473, 69th Cong., 1st Sess. 7 (1926). Thus, rather than restricting national banks' conduct of brokerage activities through interstate offices, the McFadden Act actually endorsed it. Further, only six years later, in legislating to curtail national bank securities activities and to amend the McFadden Act's branching provisions, Congress did not restrict interstate brokerage by national banks, even though it had full knowledge that the McFadden Act's bar on interstate branching was in practice not being applied to such activity. *See Securities Industry Association v. Board of Governors* (*"Schwab"*), 468 U.S. 207, 216-21 (1984) (interpreting Section 20 of the Glass-Steagall Act, 12 U.S.C. § 377 (1982)). Congress thus ratified the view that the McFadden Act does not limit the location of brokerage offices. *See, e.g., Bob Jones University v. United States*, 461 U.S. 574, 599-602 (1983).

The Comptroller's decision also is supported by the "basic function" test developed by the federal courts as an aid in applying Section 36(f). Under that test, a national bank facility is deemed to be a branch only if (1) it provides one or more banking services of the nature enumerated in Section 36(f) and (2) its operation would upset the competitive balance between state and national banks as to such services. *See, e.g., First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 136-37 (1969). It is inconceivable that discount brokerage offices could be deemed branches under this test

because, although discount brokerage is "closely related to banking," it is at base a "*nonbanking* activity." *Schwab*, 468 U.S. at 210-11 (emphasis added). Additionally, the Comptroller's interpretation is consistent with his long-standing practice of authorizing national banks to provide non-banking services, such as government and municipal securities sales, at non-branch bank facilities outside a national bank's home state.

In light of these factors, the Comptroller's ruling cannot by any stretch be considered unreasonable. The same, however, cannot be said of the lower courts' construction of Section 36(f). The courts held that a facility operated by a national bank must be deemed a McFadden Act branch if any of its activities, regardless of their nature, physically "may [be] conduct[ed] at [the bank's] main office." 577 F. Supp. at 260 (20a). But this "main office" test renders the definition of "branch" superfluous. Any function that might be performed at a remote facility, by definition, physically "may [be] conduct[ed]" at the main office. The test thus transforms each and every national bank-operated facility, regardless of function, into a branch office. Had Congress intended this definition, it easily could have enacted it, but as stated previously, the statutory language, the legislative history and years of judicial and administrative precedent oppose such a sweeping interpretation of Section 36(f). The construction of the courts below is premised entirely on a brief post-enactment remark inserted into the legislative record after Congress had adjourned. Such a statement is "not 'legislative history' in any meaningful sense of the term" and is thus entitled to no weight. *Board of Governors v. Dimension Financial Corp.*, 106 S. Ct. 681, 688 (1986).

The lower courts also erred in even reaching the merits of this case because plaintiff SIA lacks standing to seek enforcement of the McFadden Act's branching provisions. As noted above, the Act was intended to protect the "competitive equality" of national and state banks

with respect to branching. *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966). Thus, only national and state banks are within the zone of interests protected by the Act. Congress never intended non-banks, such as SIA's members, to be able to invoke the strictures of the Act to insulate themselves from competition by national banks.

ARGUMENT

Before Congress enacted the National Bank Act Amendments of 1927 (the "McFadden Act"), ch. 191, 44 Stat. 1224, a national bank was generally prohibited from conducting banking functions at locations away from its main office. *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924). In contrast, many state banks were not similarly restrained. Some states allowed their banks to establish branches wherever certain prerequisites were met, others allowed each bank to operate only a specified number, and some states allowed no branching at all. As discussed further below, *see infra* at 20-21, concern arose that allowing state banks in some jurisdictions to engage in "unlimited branch banking" while prohibiting national bank branching in those jurisdictions might cause "the eventual destruction of the national banking system." *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 257 (1966) (citation omitted). Congress therefore adopted the McFadden Act, granting national banks the right to establish branches and thereby "protect[ing them] from the unrestricted branch bank competition of state banks." *First National Bank in Plant City v. Dickinson* (*"Plant City"*), 396 U.S. 122, 131 (1969). The Act, however, allowed such branches to be operated only in a bank's home state, and to ensure "competitive equality" between national and state banks in this regard, Congress mandated that any national bank branch must comply with

the same state law restrictions on the location of branches applicable to state banks. *See* 385 U.S. at 257-58; 12 U.S.C. § 36(c) (1982).

In adopting these restrictions, Congress emphasized that every site at which a national bank conducted business did not necessarily constitute a branch. In a separate subsection of the Act (Section 36(f)), "branch" was specifically defined "to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which *deposits are received, or checks paid, or money lent.*" 12 U.S.C. § 36 (f) (1982) (emphasis added). If a particular national bank facility does not fall within this definition, it is not subject to state law restrictions on the location of branches. *Independent Bankers Association of America v. Smith*, 534 F.2d 921, 924 (D.C. Cir.) (holding that if a remote national bank office does not constitute a branch, it may be located "anywhere (even across state lines)"), *cert. denied*, 429 U.S. 862 (1976).[8] The issue presented here is whether the Comptroller lawfully construed the McFadden Act in concluding that Security Pacific's discount brokerage offices are not branches and are therefore not subject to the Act's restrictions.

I. THE COMPTROLLER'S RULING THAT THE McFADDEN ACT'S DEFINITION OF "BRANCH" DOES NOT REACH DISCOUNT BROKERAGE OFFICES SHOULD BE UPHELD.

This case calls for "review . . . [of] an agency's construction of [a] statute which it administer[s]," and the Court therefore "is confronted with two questions." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). The first is whether,

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[8] *See also Plant City*, 396 U.S. at 139 (Douglas, J., dissenting) (" 'If no branch is involved here, there is no requirement that the national bank's practice must conform to that of the state banks.' ") (citation omitted).

through the language of the statute, "Congress has directly spoken to the precise question at issue." *Id.* If so, the Court should confine itself to ascertaining whether the agency has "give[n] effect to the unambiguously expressed intent of Congress." *Id.* at 843. Only if the Court determines that the statutory language does not "directly address . . . the precise question at issue" may the analysis proceed to the second question: "whether the agency's [interpretation] is based on a permissible construction of the statute." *Id.*

Security Pacific respectfully submits that the courts below erred first by failing to recognize that the Comptroller's decision gave effect to congressional intent as unambiguously expressed in the language of Section 36(f). The courts then compounded this error by improperly expanding their review beyond the narrow issue of whether the agency's interpretation was reasonable and by substituting their own erroneous statutory interpretation.[9]

A. Under The Plain Language Of The Statute, Discount Brokerage Offices Are Not Branches.

When "determining the scope of a statute, one is to look first at its language." *North Dakota v. United States*, 460 U.S. 300, 312 (1983) (citation omitted); *see also Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). And "at least in the absence of . . . a 'clearly expressed legislative intention to the contrary,'" the analysis should stop there because the "plain language [of a statute] controls its construction." *Bread Political Action Committee v. Federal Election Commission*, 455 U.S. 577, 581 (1982) (quoting *Consumer Product Safety Commission*,

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[9] Although the two-sentence court of appeals decision did not explicitly analyze the McFadden Act issue, it expressed "agreement with the result . . . generally for the reasons stated" in the district court's opinion. *See* 758 F.2d at 740 (2a). Accordingly, the courts and decisions below hereinafter are referenced collectively.

447 U.S. at 108). *See also Board of Governors v. Dimension Financial Corp.*, 106 S. Ct. 681, 686 (1986) (quoting *Chevron*, 467 U.S. at 842-43) ("If the statute is clear and unambiguous 'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'").

Section 36(f) defines "branch"

> to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

12 U.S.C. § 36(f) (1982). Under what the courts below concluded was the "literal reading of the statute," 577 F. Supp. at 259 (18a), the Comptroller found this definition to encompass only national bank facilities which receive deposits, pay checks, or make loans and therefore to exclude offices which engage exclusively in discount brokerage. *See supra* at 5-6. The lower courts, however, construed Section 36(f) more broadly and found discount brokerage offices to be within its scope. Based solely on a post-enactment and therefore non-probative fragment of the legislative record, the courts below held that the definition should be read as covering not only national bank offices "'receiving deposits, paying checks, or lending money,'" but also any facility "'*transacting any business carried on at the* [*bank's*] *main office.*'"[10] 577

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[10] This phrase, which the lower courts interpolated into Section 36(f), was derived from a brief remark that Rep. McFadden inserted in the record ten days after the McFadden Act was passed and after Congress had adjourned. At that time, he stated that the term "branch" includes "'[a]ny place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, *or transacting any business carried on at the main office.*'" 577 F. Supp. at 259 (18a) (quoting 68 Cong. Rec. 5816 (1927)) (emphasis added). But as this Court recently observed regarding another banking statute,

F. Supp. at 259 (18a) (emphasis in original) (citations omitted). But this augmentation of the statutory language is impermissible; courts are not "license[d] . . . to rewrite language enacted by the legislature." *United States v. Albertini*, 105 S. Ct. 2897, 2902 (1985); *see also Heckler v. Mathews*, 465 U.S. 728, 741-42 (1984).[11]

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statements outside the legislative debate, even if part of the formal congressional record, are "not 'legislative history' in any meaningful sense of the term" and thus are entitled to no weight. *Board of Governors v. Dimension Financial Corp.*, 106 S. Ct. 681, 688 (1986). *See also Bread Political Action Comm. v. Federal Election Comm'n*, 455 U.S. 577, 582 n.3 (1982) (post-enactment statements of legislators deserve no "probative weight"); *Quern v. Mandley*, 436 U.S. 725, 736 n.10 (1978) ("*post hoc* observations by a single member of Congress carry little if any weight"). The McFadden Act embodies a conscious compromise between those in Congress who would have prohibited national bank branching altogether and those who would have allowed it freely, *see infra* at 36, and reliance on a single post-enactment remark "at the expense of the terms of the statute itself [would take] no account of the processes of compromise and, in the end, prevent . . . the effectuation of congressional intent." *Dimension Financial Corp.*, 106 S. Ct. at 689. Further, this particular statement is an especially unreliable indicator of legislative intent given Rep. McFadden's prior unsuccessful opposition to all branching by both federal and state banks. *See, e.g.*, 67 Cong. Rec. 2829, 2832 (1926). In any event, this lone post-enactment statement hardly constitutes a "clearly expressed legislative intention" to negate the statute's plain language. *Bread Political Action Comm.*, 455 U.S. at 581 (citation omitted). It serves primarily to demonstrate how easily Congress could have adopted a broader branch definition had it so wished.

[11] Contrary to SIA's assertion, the use of the term "include" in Section 36(f) does not suggest a "calculated indefiniteness" with respect to the question of which functions suffice to make a national bank office a branch. *See* SIA Br. in Opp. at 3 (quoting *Plant City*, 396 U.S. at 135). In that respect, Congress was explicit and precise —a facility is a branch if it receives deposits, pays checks, or makes loans. Any "calculated indefiniteness" extends only to the question of which places may be deemed to constitute branches provided that the requisite functions are performed there. In that regard, Congress was indeed open-ended, "includ[ing] any branch bank, branch office, branch agency, additional office, or any branch place of busi-

The lower courts' rejection of the Comptroller's view that Section 36(f) does not embrace those facilities involved exclusively in discount brokerage is erroneous for the further reason that in Section 2(b) of the Act, Congress simultaneously amended prior law to grant national banks explicit authority to engage in securities brokerage activities. *See* ch. 191, § 2(b), 44 Stat. 1224, 1227 (1927).[12] S. Rep. No. 473, 69th Cong., 1st Sess. 7 (1926); 67 Cong. Rec. 2828 (1926) (statement of Rep. McFadden). Had Congress wished to limit the location of brokerage activities, it could easily have included them among the restricted functions it carefully delineated in the Act's branch definition. That Congress specifically legislated on the subject of national bank securities activities elsewhere in the McFadden Act creates a presumption that the omission of specific reference to such activities in Section 36(f) was intentional. *See, e.g., Russello*

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ness." But any "indefiniteness" ends there because the term "include" does not govern the latter two clauses in the definition. *See Continental Illinois Nat'l Bank & Trust Co. v. Lignoul*, No. 76-C-2209 (N.D. Ill. Nov. 9, 1976), slip op. at 17-18 (emphasis added) (reprinted in Gov't C.A. Br. Addendum C) ("The term 'include' . . . does not relate to the activities involved but refers to the *places* at which the specified activities of receiving deposits, paying checks and lending money are carried out."). Indeed, applying "include" to the phrase "located in any State or Territory of the United States or the District of Columbia" would make no sense because as it stands, the clause could "include" no more than what it already states. National bank branching in other jurisdictions—"foreign countries, or dependencies, or insular possessions of the United States"—is separately addressed by Section 36(g). *See* ch. 191, § 7(g), 44 Stat. 1229 (codified at 12 U.S.C. § 36(g) (1982)). *A fortiori*, the "functions" portion of the definition (*i.e.*, "deposits received, or checks paid, or money lent"), two clauses removed from the term "include," also is outside that term's scope.

[12] This provision (codified as amended at 12 U.S.C. § 24 (Seventh) (Supp. II 1984)) authorized national banks to engage in the "business of buying and selling investment securities." The legislative history of this provision and its importance in interpreting Section 36(f) is further discussed *infra* at 24-25.

v. United States, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)) ("'[If] Congress includes particular language in one section of the statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"); *Bread Political Action Committee*, 455 U.S. at 583; *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505, 515 (1963).

In summary, under the plain language of Section 36(f), a facility may be deemed a branch under the McFadden Act only if it engages in at least one of the three functions enumerated in that section. *See* 577 F. Supp. at 259 (18a). Since the lower courts identified no "clearly expressed legislative intention to the contrary," they erred by not abiding by the statutory terms. *Consumer Product Safety Commission*, 447 U.S. at 108. Given the plain language of the statute and the Comptroller's uncontested finding that Security Pacific's discount brokerage offices perform none of the functions enumerated in Section 36(f) (30a-33a), the Comptroller's conclusion that these offices are not branches should have been upheld.

B. All Relevant Criteria Indicate That The Comptroller's Interpretation Was Reasonable.

The plain language of Section 36(f) should be "the end of [this] matter." *Chevron*, 467 U.S. at 842; *see supra* at 15-16. But even if there were an ambiguity in the branch definition, the Comptroller's construction should not be disturbed so long as it "'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute.'"[13] *Id.* at 845

[13] In other words, the issue is not whether the "construction was the only one [the agency] permissibly could have adopted" or whether the interpretation is the one "the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 483 n.11 (citations omitted). *See also United*

(quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)).[14] All the indicia which should guide this narrow review—statutory language, legislative history, prior judicial interpretation, and prior administrative actions—demonstrate that the Comptroller's interpretation of Section 36(f) was eminently reasonable.[15]

1. *Statutory Language And Legislative History.*

As discussed in the previous section, the language of Section 36(f) fully supports the Comptroller's decision that the McFadden Act's branch definition encompasses only facilities engaged in at least one of the three enumerated functions and that discount brokerage offices therefore are not branches. *See supra* at 15-19. That conclusion is also strongly supported by the Act's legislative history.

Under the National Bank Act of 1864, ch. 106, § 8, 13 Stat. 100, 101-02, the "usual business" of a national bank was restricted to its main office. *See* Rev. Stat. 5190; *First National Bank in St. Louis v. Missouri*, 263 U.S. 640, 657 (1924). For years, similar restrictions had existed on state-chartered banking institutions, but

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States v. Riverside Bayview Homes, Inc., 106 S. Ct. 455, 461 (1985); *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 105 S. Ct. 1102, 1108 (1985).

[14] As the courts below conceded, special deference should be accorded to the Comptroller's rulings because "[t]he regulatory structure of the banking laws must be permitted to adapt to the changing financial needs of our economy" and because Congress has delegated to the Comptroller, "rather than to [the courts], the complex task of applying [the law's] . . . proscriptions to the current business reality." 577 F. Supp. at 254 (7a) (citation omitted). *See also Board of Governors v. Agnew*, 329 U.S. 441, 450 (1947) (Rutledge, J., concurring) (noting that banking regulators' "judgment . . . upon any matter which . . . is open to reasonable difference of opinion . . . should be conclusive"); *Schwab*, 468 U.S. at 217.

[15] *See, e.g., United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 455, 461 (1985); *Chevron*, 467 U.S. at 859-66.

in the early 1920's, many states began allowing their banks to branch. As a result, concerns arose that national banks would be unable to compete in providing banking services. 67 Cong. Rec. 2832 (1926) (statement of Rep. McFadden); *id.* at 2839 (statement of Rep. Hooper). Because of the expanded branching opportunities provided under state laws, 253 national banks left the national system between 1923 and 1926 to operate under state charters. *Annual Report of the Comptroller of the Currency* 2 (1926) (hereinafter "*Annual Report*"). Congress feared that this exodus might continue with disastrous results. *See, e.g.*, 67 Cong. Rec. 2832 (1926) (remarks of Rep. McFadden); *id.* at 2856 (statement of Rep. Black); 66 Cong. Rec. 4432 (1925) (statement of Sen. Pepper).[16] Thus, to prevent the "eventual destruction of the national banking system," Congress passed the McFadden Act to authorize national banks to establish branches. *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 257 (1966) (citation omitted). Congress thereby "intended to place national and state banks on a basis of 'competitive equality' insofar as branch banking was concerned." *Walker Bank*, 385 U.S. at 261; 68 Cong. Rec. 5815 (1927) (statement of Rep. McFadden).

Nothing in the three-year legislative history of the McFadden Act reflects an intent to limit the ability of national banks to perform non-banking activities (*e.g.*, brokerage) at locations away from their main offices. *See supra* at 13-14. In enacting the branching restrictions of Section 36, Congress' sole purpose was to preserve the competitive balance as to the provision of banking services *per se* (*i.e.*, supplying money and credit and receiving deposits). *See, e.g.*, 67 Cong. Rec. 2832 (1926) (statement of Rep. McFadden) ("statewide branch bank-

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[16] *See also Annual Report* at 2 ("[The] widespread desertions from the national system are clearly indicative of the difficulty which national banks find in operating under their present charter powers.").

ing will eventually lead to monopolistic control over the credit facilities of an entire state"); *id.* at 2844 (statement of Rep. Nelson) ("Branch banking inevitably tends toward concentration of money and credit in the hands of the few"). As stated by Rep. Celler, branches were perceived as additional offices "where [banks] receive deposits, pay out deposits and lend money, discount, and do an actual banking business." *Id.* at 2860. *See also id.* at 2855 (statement of Rep. Kurtz) ("[u]sually . . . branches only exist for the purpose of receiving deposits"); 66 Cong. Rec. 4433 (1925) (statement of Sen. Shipstead) (offices "where checks are cashed and deposits are accepted for practical purposes are branches"); *id.* at 1627 (1925) (statement of Rep. Stevenson) (urging Congress to regulate "agencies for receiving deposits and paying checks"). Thus, reflecting the articulated concerns of Congress, the McFadden Act branch definition speaks solely in the terms of banking functions (*i.e.*, deposits, checks, and loans).

The Act's legislative history is not only devoid of any indication that Congress intended to limit the locations at which national banks could engage in non-banking activities, but it contains clear evidence of a specific congressional intent to approve national bank operation of interstate brokerage offices. As the lower courts recognized, one of the well-established non-banking functions performed by national banks prior to the McFadden Act's passage was securities brokerage. *See* 577 F. Supp. at 255 (10a); *see also* H.R. Rep. No. 83, 69th Cong., 1st Sess. 2 (1926) (noting that "it [was] a matter of common knowledge that national banks [had] been engaged in the investment-securities business . . . for a number of year").[17] Indeed, "[t]he practice of providing invest-

[17] For example, in a 1930 opinion, then-Judge Cardozo noted that the "practice" of national bank involvement in the securities business had been sufficiently common for so long that "it may be the subject of judicial notice." *Block v. The Pennsylvania Exch. Bank*, 253 N.Y. 227, 232-33 (1930) (citing *Central Nat'l Bank v. White*, 139 N.Y. 631 (1893)).

ment services through commercial banks became so popular during the twenties that customers came to expect their commercial bankers to recommend and purchase securities for them." W. Peach, *The Security Affiliates of National Banks* 74 (1941).[18] National banks typically conducted such activities through "security affiliates" (*e.g.*, wholly-owned subsidiaries of the parent banks),[19] and although the National Bank Act of 1864 restricted a national bank's "usual" business to its main office, Rev. Stat. 5190, *see supra* at 20, those restrictions were deemed inapplicable to security affiliates.[20] Thus, in the pre-McFadden Act period, national banks commonly estab-

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[18] By 1922, there were 62 national banks directly engaged in securities-related activities and 10 others had formed security affiliates for that purpose. W. Peach, *supra*, at 83. *See also* Perkins, *The Divorce of Commercial and Investment Banking: A History*, 88 Banking L.J. 483, 492 (1971); V. Carosso, *Investment Banking in America* 271-72, 273-75 (1970).

[19] *Operation of the National and Federal Reserve Banking Systems: Hearings on S. Res. 71 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 71st Cong., 3d Sess. 1055-56 (1931).

[20] By its terms, Rev. Stat. 5190 did not require a national bank to conduct *all* of its business at its main office. Well before passage of the McFadden Act, the "cases clearly indicate[d] . . . a vital distinction between a mere agency for the transaction of a particular business and a branch bank wherein is carried on a general banking business." *Lowry Nat'l Bank*, 29 Op. Att'y Gen. 81, 87 (1911) (cited with approval in *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 657 (1924)). *See also Merchants Nat'l Bank of Boston v. State Nat'l Bank of Boston*, 77 U.S. (10 Wall.) 604, 651 (1871).

Similarly, 12 U.S.C. § 81 (1982), the present-day successor to Rev. Stat. 5190, does not restrict all of a national bank's business to its main office or branches, only its "general business." Indeed, if all national bank business had been so restricted, there would have been no need for Congress to have articulated a branch definition at all in the McFadden Act, since logically, every national bank office that is not a bank's main office would have to be a branch.

lished security affiliate operations at locations away from their main offices, frequently on an interstate basis. *See* Perkins, *The Divorce of Commercial and Investment Banking: A History*, 88 Banking L.J. 483, 494 n.26 (1971) ("[t]he securities affiliates of some of the larger banks had offices throughout the country and even in foreign countries"); W. Peach, *supra*, at 87-89; V. Carosso, *Investment Banking in America* 278 (1970).

Before 1927, national banks lacked explicit power to buy and sell securities, but they carried on this business "under their incidental charter powers." S. Rep. No. 473, 69th Cong., 1st Sess. 7 (1926); *see also* W. Peach, *supra* at 39. Since this had become a regular function of state banks, both the House and Senate Banking and Currency Committees recommended in 1926 that the McFadden Act explicitly give national banks similar powers. *See* H.R. Rep. No. 83, 69th Cong., 1st Sess. 3-4 (1926); S. Rep. No. 473, 69th Cong., 1st Sess. 7 (1926).[21] Thus, in Section 2(b) of the McFadden Act, enacted simultaneously with Section 36(f), Congress "recognize[d]" and "confirm[ed]" the authority of national banks to engage in the "business of buying and selling investment securities,"[22] H.R. Rep. No. 83, 69th Cong., 1st Sess. 3 (1926), thereby "affirm[ing] the existence of a type of business which national banks are now conducting." S. Rep. No. 473, 69th Cong., 1st Sess. 7 (1926). And since Congress obviously was aware of the

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[21] As Rep. McFadden noted, Congress was of the opinion that "modern" national banks needed the authority to "conduct . . . an investment securities business." *Hearings on the Consolidation of National Banking Associations Before a Subcomm. of the Senate Comm. on Banking and Currency*, 69th Cong., 1st Sess. 22 (1926).

[22] Congress, however, limited such activities to "buying and selling [such securities] without recourse," and regulated the amount of such securities any bank could hold to 25% of its capital stock and surplus. Ch. 191, § 2(b), 44 Stat. 1227.

interstate nature of those national bank activities,[23] this legislative history evinces unambiguous congressional intent to "affirm" (not preclude) the conduct of national bank brokerage activities through interstate offices.[24] *Id.*

Consistent with this view, the McFadden Act's passage had no restrictive effect on the interstate nature of national bank securities activities. After 1927, the number of national banks engaging in securities activity increased significantly, *see* W. Peach, *supra*, at 83, and many were opening securities offices nationwide.[25] Further, four years after enacting Section 36(f), the Senate banking committee observed that national bank "security affiliates may be organized in any State, and several of them operated by New York banks are organized in Delaware." *See Operation of the National and Federal Reserve Banking Systems: Hearings on S. Res. 71 Before a Subcomm.*

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[23] *See, e.g.*, 67 Cong. Rec. 8351 (1926) (statement of Sen. Pepper) (noting that national banks were carrying on securities business "to a very large extent throughout the country").

[24] Further, given the considerable extent to which Congress addressed national bank securities offices in the McFadden Act, it cannot credibly be argued that Congress intended to include such offices within the scope of the Act's branch definition and that the omission of securities offices from Section 36(f) was merely an oversight. *See supra* at 18-19.

[25] For example, in July 1927, only five months after passage of the McFadden Act, the security affiliate of the Chase National Bank began considering the "retail distribution of securities." W. Peach, *supra*, at 96. In October of that year, Chase announced plans to establish a complete system of securities offices "throughout this country and Canada." *Id.* (citing Commercial and Financial Chronicle, Oct. 15, 1927, at 2063). Then, in December 1927, a "retail department" was actually established by Chase, which proceeded to open offices in Chicago, Cleveland and Boston the following year. *Id.* at 96-97. By 1931, Chase had offices in fifty-three cities in twenty-six states. *Id.* at 97. *See also id.* at 97-98 (outlining the extensive establishment of interstate securities offices by other national banks in the years immediately following passage of the McFadden Act).

of the Senate Comm. on Banking and Currency, 71st Cong., 3d Sess. 1057 (1931) (hereinafter "*1931 Senate Hearings*").[26] In sum, neither before nor after enactment of the McFadden Act did Congress, federal banking regulators, or national banks perceive the Act's branching restrictions to apply to national bank securities activities, thus corroborating the Comptroller's more recent interpretation to the same effect. *See Schwab*, 468 U.S. at 218.

Additional support for the Comptroller's construction of Section 36(f) is provided by subsequent congressional action in the area. Six years after the McFadden Act became law, Congress moved to restrict the securities activities of national banks. In 1933, it enacted the Glass-Steagall Act, the relevant portion of which outlawed national bank involvement in underwriting activities (*i.e.*, investing in securities for a bank's own account). *See* ch. 89, § 20, 48 Stat. 162, 188 (1933) (codified at 12 U.S.C. § 377 (1982)). But as this Court recently found, that legislation in no way restricted a national bank's ability to broker securities for other entities and persons. *See Schwab*, 104 S. Ct. at 3009-12.[27] In adopting this regulation of national bank securities activities, Congress was fully aware that the McFadden Act had not been interpreted by banking regulators or national banks to inhibit the conduct of securities-related activities through interstate offices. *See, e.g., 1931 Senate Hearings, supra*, at 1055-57 (noting that such activities were permitted and were occurring on an interstate basis). Yet, in

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[26] *See also* Osterweis, *Security Affiliates and Security Operations of Commercial Banks*, Harv. Bus. Rev., Oct. 1932, at 124, 127 (noting in the post-McFadden Act period the "possibility of nationwide [retail] distribution" of securities as a means of national bank publicity).

[27] *See also SIA v. Comptroller*, 577 F. Supp. 252, 254-57 (D.D.C. 1983), *aff'd*, 758 F.2d 739 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 790 (1986).

adopting this new legislation in the area (which also included amendments to the McFadden Act's branching restrictions),[28] Congress did not expand the Section 36(f) branch definition to include brokerage activities nor did it otherwise seek to limit the location of national bank brokerage offices. Congress therefore can be understood to have ratified the very interpretation of Section 36(f) the Comptroller rendered in this case: brokerage offices are not subject to the McFadden Act's branching restrictions. *See United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979) (once a regulator's "statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned"). *Accord Bob Jones University v. United States*, 461 U.S. 574, 599-602 (1983); *Haig v. Agee*, 453 U.S. 280, 300-01 (1981).[29]

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[28] The Glass-Steagall Act specifically amended the McFadden Act to enhance (not curtail) national bank authority to branch. As originally enacted, the McFadden Act limited national bank branches to large towns and cities in those states which permitted branch banking for state banks. Ch. 191, § 7(c), 44 Stat. 1224, 1228 (1927). With the bank failures of the Depression, the Glass-Steagall Act amended those provisions to permit national banks to establish branches outside these urban areas to the extent allowed by the state laws applicable to state-chartered banks. *See* ch. 89, § 23, 48 Stat. 162, 189 (1933).

[29] Congressional awareness that the Comptroller does not interpret the McFadden Act to restrict the location of non-banking activities (*e.g.*, discount brokerage) has continued into more recent times, evoking neither expressions of congressional protest nor legislative efforts to restrict these activities. For example, during legislative deliberations concerning the International Banking Act of 1978, concern was expressed about foreign banks using widely-dispersed offices to create a "growing multistate presence." S. Rep. No. 1073, 95th Cong., 2d Sess. 7 (1978). Some legislators worried that this interstate capability of foreign banks would cause

2. Judicial Precedents.

Prior to the decisions below, federal courts of appeals assessing whether a national bank facility is a McFadden Act branch have proceeded from the Comptroller's interpretation that only facilities performing one of the functions enumerated in the Act's definition (*i.e.*, receiving deposits, paying checks, or lending money) may be deemed to be a branch. In fact, at least one of these courts has specifically rejected arguments that Section 36(f) encompasses anything more. *See Jackson v. First National Bank of Gainesville*, 430 F.2d 1200, 1201 (5th Cir. 1970) (observing that facilities engaged in activities "such as real estate, stock investments, life insurance, etc." are not branches, noting that "none of those activities constitute 'branch banking' as now defined, but rather relate to non-banking functions"), *cert. denied*, 401 U.S. 947 (1971).

Because of the difficulty sometimes encountered in determining whether a particular facility is engaging in any of the three functions enumerated in Section 36(f), however, the courts have developed and generally apply a "basic function" test. Under this test, a national bank facility is a branch only if (1) it provides one or more banking services of the nature enumerated in the Act's branch definition and (2) its operation would upset the federal-state bank competitive balance as to such banking functions. For example, in *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969), this Court concluded that two remote national bank facilities (a teller window-equipped armored car and a drop box for deposits) constituted branches under the McFadden Act,

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competitive injury to national banks. Legislators favoring broad branching powers for foreign banks, however, cited the numerous non-branch facilities operated by national banks on an interstate basis as evidence that authorizing widespread branching by foreign banks would not cause such injury. *See* 124 Cong. Rec. 9095 (1978); 122 Cong. Rec. 24,403 (1976).

but only after an exhaustive examination of whether those facilities provided "basic bank services" that might give a national bank "an advantage in its competition" with state banks. *Id.* at 136-37. More recently, in *Independent Bankers Association of New York State, Inc. v. Marine Midland Bank*, 757 F.2d 453, 459-61 (2d Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3007 (U.S. June 27, 1985) (No. 84-2023), the Second Circuit sought to identify banking functions and assessed competitive impact in concluding that the branch definition did not reach an automatic teller machine located in a grocery store and used but not owned by a national bank. *See also Colorado ex rel. State Banking Board v. First National Bank of Fort Collins*, 540 F.2d 497, 500 (10th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977) (making a detailed inquiry to determine whether national bank customer-bank communications terminals ("CBCTs") performed "traditional banking transaction[s]" that would disrupt the "competitive equality" of federal and state banks); *Jackson*, 430 F.2d at 1201.[30]

The Comptroller's conclusion that discount brokerage offices are not McFadden Act branches is wholly consistent with these precedents.[31] The activities of such offices

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[30] Before deciding this case, the D.C. Circuit also subscribed to the "basic function" test. *See Independent Bankers Ass'n of Am. v. Heimann*, 627 F.2d 486, 488 & n.** (D.C. Cir. 1980) (disagreeing with district court conclusion that national bank loan production office not performing banking functions was a branch); *Independent Bankers Ass'n of Am. v. Smith*, 534 F.2d 921, 938-40, 941 n.73, 943 (D.C. Cir.) (concluding that a national bank's remote CBCTs were branches only after detailed evaluation of whether they performed "routine and traditional" banking functions that "closely resemble[d], in competitive effect" the functions referenced in the Act's branch definition), *cert. denied*, 429 U.S. 862 (1976).

[31] The only arguably inconsistent court of appeals opinion is *St. Louis County Nat'l Bank v. Mercantile Trust Co.*, 548 F.2d 716 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977), in which the court found a suburban trust office to be a branch even though it

(*i.e.*, serving as agent in the purchase and sale of stocks, bonds, and options) are fundamentally different from the banking functions enumerated in Section 36(f) and could not possibly "closely resemble [them] in competitive effect." *Independent Bankers Association of America v. Smith*, 534 F.2d 921, 941 n.73 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976). As this Court held in *Schwab*, although discount brokerage is "closely related to banking," it is at base a "*nonbanking* activity." *Schwab*, 468 U.S. at 210-11 (emphasis added).[32]

3. *Prior Administrative Decisions.*

The precept that McFadden Act branching restrictions reach only those facilities engaged in Section 36(f)'s three enumerated functions has been long embraced by the Comptroller. Over the past twenty years, the Comptroller has permitted national banks to provide many non-banking services (*e.g.*, consulting services to other banks, business records maintenance for customers, check

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was not performing any of the functions enumerated in Section 36(f). As discussed below, the case was wrongly decided. *See infra* at 33 n.36. Nevertheless, the Comptroller's decision took that case into account, concluding that Security Pacific's discount brokerage offices would "not constitute branching functions either as enumerated in Section 36(f) or even under the expansive *St. Louis County* approach." (34a.)

[32] The structure of 12 U.S.C. § 24 (Seventh) (Supp. II 1984), the statute which authorizes national bank activities, also indicates that brokerage is a function distinct from banking. There, Congress defined the "business of banking" to include "discounting and negotiating promissory notes, drafts, bills of exchange, and other evidence of debt; . . . receiving deposits; . . . buying and selling exchange, coin, and bullion; loaning money on personal security; and . . . obtaining, issuing and circulating notes." Brokerage is noticeably absent from this list of "banking" activities. Indeed, the authorization for national bank involvement in brokerage is contained in a different sentence of the statute, referring to a distinct "business of dealing in securities and stock." *Id.*

verification services for merchants, installation and operation of electronic credit card verification terminals in stores, audit services for other banks, computer software development for banks and other customers, data processing services, and financial and investment consulting).[33] These services for some time have commonly been provided at non-branch bank facilities, often located outside a national bank's home state.[34] For example, pursuant to specific authorization by the Comptroller, *see* 12 C.F.R. § 7.7380 (1985), national banks now maintain hundreds of interstate loan production offices, *see* Department of the Treasury, *Geographic Restrictions on Commercial Banking in the United States: The Report of the President* 186 n.4 (1981), and operate numerous U.S. government and municipal securities dealer offices on an interstate basis. *See Comptroller Release*, [1982-1983 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 99,284, at 86,261 (Aug. 26, 1982).

The widespread provision of non-banking services at remote locations, which is now a firmly-entrenched, integral element of the national banking regime, stands as evidence that the Comptroller has long construed the McFadden Act's branching restrictions to be inapplicable to national bank facilities engaged exclusively in non-banking activities. Since the Comptroller's ruling here is merely a further manifestation of this "longstanding and consistent administrative interpretation" of Section 36(f), it not only meets the requirement of being con-

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[33] *See Comptroller of the Currency, Policies and Procedures Manual* 4330-11 (rev. 1982). *See also* Glidden, *The Regulation of National Banks' Subsidiaries*, 40 Bus. Law. 1299, 1302-03 (1985).

[34] *See, e.g., Foreign Bank Act of 1975: Hearings on S. 958 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 154-56, 433, 509-10 (1976); *International Banking Act of 1977: Hearings on H.R. 7325 Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 1st Sess. 301, 473-74, 556, 576 (1977).

sistent with prior rulings, but it is "entitled to considerable weight," even beyond that normally afforded administrative interpretations. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978).

C. The Interpretation Substituted By The Lower Courts Is Untenable.

As the court of appeals dissenters observed, the Comptroller's conclusion that national bank-operated discount brokerage offices are not branches "cannot by any means be considered unreasonable." 765 F.2d at 1198 (42a). The same cannot be said of the statutory construction the courts below would substitute.

As discussed above, the lower courts' interpretation is at odds with the plain language of Section 36(f). Moreover, it is wholly inconsistent with the historical interpretation of the section rendered by Congress, the courts, and the Comptroller. *See supra* at 20-31. But beyond these fundamental flaws, the lower courts' interpretation is patently illogical. In concluding that Security Pacific's discount brokerage offices are branches, the courts employed a test under which a facility operated by a national bank would be deemed a McFadden Act branch if any of its activities, regardless of their nature, physically "may [be] conduct[ed] at [the bank's] main office." 577 F. Supp. at 260 (20a). But this "main office" test renders the branch definition meaningless. Any function that might be performed in a remote national bank facility, by definition, "may [be] conduct[ed]" at the main office. The test thus transforms each and every national bank facility, regardless of function, into a branch.[35]

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[35] As one court observed in rejecting the "main office" test, it "could not be seriously contended" that a bank establishes a branch wherever it sets up an office to perform a service, however trivial (*e.g.*, selling railway tokens, food stamps, license plates, Olympic coins, Bicentennial medallions), that also could be performed at the main office. *See Continental Illinois Nat'l Bank & Trust Co. v. Lignoul*, No. 76-C-2209, slip op. at 17 (N.D. Ill. Nov. 9, 1976).

The courts below found justification for the "main office" test primarily in dicta from *Plant City*, which they read to suggest a "calculated indefiniteness" with respect to the outer limits of the functions enumerated in the Act's branch definition. *See* 577 F. Supp. at 259 (19a) (citing 396 U.S. at 135) (emphasis in original).[36] But implicit in the suggestion the lower courts perceived in *Plant City* is a notion that there are some limits to the Act's branch definition. Because the "main office" test admits of no such limits, the test is actually in direct conflict with the purported inferences the courts drew from *Plant City*.[37] *See supra* at 17-18 n.11.

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[36] The courts below also relied on a fragment of the legislative record that should have been given no weight. *See supra* at 16-17 n.10. Further, they noted the decision of a divided Eighth Circuit panel which first articulated the "main office" test. *See St. Louis County Nat'l Bank v. Mercantile Trust Co.*, 548 F.2d 716 (8th Cir. 1976) (finding national bank's suburban office performing only trust services, a function not enumerated in Section 36(f), to be a branch because such services also were performed in the bank's main office), *cert. denied*, 433 U.S. 909 (1977) (cited at 577 F. Supp. at 260) (19a-20a). But as noted by the D.C. Circuit dissenters, that analysis had heretofore been "followed nowhere else." 765 F.2d at 1197 (41a). The forceful dissent to the Eighth Circuit opinion observed that national bank involvement in trust services was "well known to Congress," and "if Congress had intended to include in its definition of a 'branch' a trust office . . ., it would have said so just as it specifically mentioned the accepting of deposits, the cashing of checks, and the lending of money." 548 F.2d at 721 (Henley, J., dissenting).

[37] The district court also noted without explanation that brokerage services are "aimed at attracting and servicing customers conveniently." 577 F. Supp. at 260 (20a). But even had a "customer convenience" test been adopted by the district court, such a test is no more successful than the "main office" test in giving meaning to the Act's branch definition, since all national bank services are in some way "aimed at attracting and servicing customers conveniently." Moreover, to the extent that a "customer convenience" test is calculated generally to inhibit national bank competitiveness against non-bank entities (like the members of the SIA), it would be inconsistent with the McFadden Act's limited purpose of regulating only certain elements of competition between national banks and state banks. *See supra* at 21-22.

The consequences of applying the "main office" test in this case are indefensible. Because of the relatively low commissions charged by discount brokers, they require a high volume of business, a result difficult to achieve when the broker is permitted to operate only in its home state and only at its main office and authorized branches. The ruling of the courts below therefore may seriously inhibit meaningful national bank participation in discount brokerage.[38] Thus, ironically, the courts below (at SIA's behest) have used the McFadden Act, a statute intended to promote competition, to deprive the public of the full benefit of competition in the discount brokerage market.

II. THE COURTS BELOW FAILED TO APPLY THE ZONE-OF-INTERESTS STANDING REQUIREMENT, THEREBY ALLOWING SIA TO OBTAIN COMPETITIVE ADVANTAGES CONGRESS NEVER INTENDED.

As recently reaffirmed, only a party which can demonstrate standing may seek federal court resolution of "cases" and "controversies" under Article III of the Constitution. *See Bender v. Williamsport Area School District*, 106 S. Ct. 1326, 1331, 1334 n.8 (1986); *see also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). A plaintiff must show, *inter alia*, that it has suffered "injury in fact," *Allen v. Wright*, 104 S. Ct. 3315, 3326 (1984); *Valley Forge*, 454 U.S. at 473, and that its complaint falls "within the zone of interests protected by the law invoked." *Allen v. Wright*, 104 S. Ct. at 3325. *See also Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970).

A mere showing of injury does not establish that a party is within the zone of interests of the law invoked.

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[38] The rulings also have the anomalous effect of allowing bank holding companies to continue operating their discount brokerage subsidiaries on a nationwide basis, *see supra* at 4-5 n.4, while national banks are denied full entry to the market.

See, e.g., Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 39 n.19 (1976); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 227 n.16 (1974); *Data Processing*, 397 U.S. at 152-56.[39] Nevertheless, in this case, SIA was found to be within the zone of interests of the McFadden Act merely because the lower courts believed that the Comptroller's alleged failure to enforce the Act's branching provisions "would harm SIA's members." 577 F. Supp. at 259 (17a).[40] As Judge Scalia aptly stated in dissent, the courts below impermissibly "conflate[d]" the "injury-in-fact" and "zone-of-interests" requirements, never making the requisite distinct inquiry into whether SIA's claims were within the zone of interests to be protected by the McFadden Act. 758 F.2d at 740 (3a).[41]

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[39] The zone-of-interests requirement serves the important purpose of protecting the legislature's prerogative to determine the interests protected by a statute. *See Data Processing*, 397 U.S. at 154; *Leaf Tobacco Exporters Ass'n v. Block*, 749 F.2d 1106, 1115 (4th Cir. 1984). "A test requiring only injury in fact . . . would necessarily obstruct and undermine legislative control and guidance over essentially political issues by conferring standing to litigate on a host of parties whose interests Congress failed to protect." *Branch Bank & Trust Co. v. National Credit Union Admin. Bd.*, 786 F.2d 621, 624 (4th Cir. 1986).

[40] The district court justified its conclusions concerning the zone-of-interests requirement solely by reference to its injury-in-fact analysis:

> To be sure, the McFadden Act restricts national banks not in the type of business they may conduct but where they may conduct it. Still, attempts to exceed those curbs would *harm* SIA's members just as the data processors in *Data Processing* and the tour operators in *Arnold Tours*. Accordingly, SIA is arguably within the zone of interests sought to be protected by the Act.

577 F. Supp. at 258-59 (17a) (emphasis added).

[41] Prior to this case, the D.C. Circuit had been far more meticulous in evaluating whether plaintiffs had actually met the zone-of-interests standing prerequisite. *See, e.g., Glass Packaging Inst. v. Regan*, 737 F.2d 1083, 1088 (D.C. Cir.), *cert. denied*, 105 S. Ct.

Had the courts below conducted a proper standing inquiry, they would have found that the McFadden Act and its legislative history provide absolutely no indicia that the Act was intended to benefit the interests of non-bank competitors of national banks. To the contrary, Congress adopted the McFadden Act for the sole purpose of giving two groups—national banks and state banks—a mechanism by which they could preserve their "competitive equality" with respect to branch banking. *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966); *see also supra* at 21. As such, the Act represents a "carefully balanced legislative compromise concerning two primarily interested groups."[42] *R. T. Vanderbilt Co. v. Occupational Safety & Health Review Commission*, 708 F.2d 570, 577 (11th Cir. 1983). The courts below upset the balance struck by Congress by allowing interlopers (*i.e.*, non-banks) to exploit the legislation to insulate themselves from competition by national banks. *See, e.g., Leaf Tobacco Exporters*, 749 F.2d at 1115 ("[W]here Congress has . . . clearly defined the class to be protected, the zone test . . . prevent[s] groups outside of the class from usurping the legislative entitlement"); *Bank Stationers Association v. Board of Governors*, 704 F.2d 1233, 1236-37 (11th Cir. 1983).

Even if the decisions below suggest that the courts made some attempt at a zone-of-interests analysis, it was badly misguided and wholly inadequate.[43] From the out-

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509 (1984); *Copper & Brass Fabricators Council, Inc. v. Department of the Treasury*, 679 F.2d 951, 952 (D.C. Cir. 1982).

[42] *See* 66 Cong. Rec. 4527 (1925) (statement of Sen. Pepper) (noting that the McFadden Act was intended "to give to national banks . . . such a measure of relaxation and privilege . . . as will go a little in the direction of helping the national banks, but not far enough . . . to arouse any of the reasonable apprehensions of those who are opposed to branch banking altogether").

[43] Stating that there "need [not] be any explicit expression in the statute or its legislative history for the court to find that SIA

set, their inquiry was doomed by a mistaken belief that the McFadden Act was intended "to curb the scope of national banks' activities" in general.[44] 577 F. Supp. at 258 (17a). Congress has enacted some statutes to preclude national bank competition with non-bank entities in fields unrelated to banking.[45] *See Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 157 (1970) (interpreting the Bank Service Corporation Act, 12 U.S.C. § 1864); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 46 (1970) (same). But that is not the congressional intent of all banking statutes.

As discussed above, the McFadden Act was intended to enhance (not diminish) the competitiveness of national banks and certainly was not enacted to protect non-bank interests. *See supra* at 21. It is therefore

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is within the zone of interests protected by the McFadden Act," the courts below simply declined to examine these potential indicia of legislative intent. 577 F. Supp. at 258 (16a). The courts below thus failed to make a critical and, in this case, dispositive inquiry on the zone of interests question. *See Barlow v. Collins*, 397 U.S. 159, 164-65 & 165 n.7 (1970) (the statutory language and legislative history of 7 U.S.C. § 1444(d) revealed Congress' intent to protect tenant farmers' interests); *Branch Bank & Trust Co. v. National Credit Union Admin. Bd.*, 786 F.2d 621, 625-26 (4th Cir. 1986); *R.T. Vanderbilt Co.*, 708 F.2d at 576; *Control Data Corp. v. Baldrige*, 655 F.2d 283, 294 (D.C. Cir.), *cert. denied*, 454 U.S. 881 (1981).

[44] The district court derived this erroneous perception by "read[ing]" the McFadden Act's provisions "in conjunction with the original restrictions of the National Bank Act." 577 F. Supp. at 258 (17a). Rather than perpetuate the National Bank Act's branching restrictions, however, the McFadden Act was actually intended to *reduce* previous locational restrictions on national banks. *See supra* at 20-21. Thus, Congress' purpose in enacting the McFadden Act in no way coincided with any intent it may have had in 1864 "to curb the scope of national banks' activities." 577 F. Supp. at 258 (17a).

[45] That SIA may have had standing in this case to raise claims under the Glass-Steagall Act, parts of which contain general prohibitions against non-banking activity, cannot give it standing to raise claims under the McFadden Act, which embodies "different

dispositive that this lawsuit was brought by neither a national bank nor a state bank, but rather by an association of non-banks seeking to use the McFadden Act to shield their members from competition and deny the public the benefits thereof.[46]

If the decisions below stand, their expansive view could be read as giving any non-bank entity, such as a business "competing for the parking spaces that an unlawful branch may occupy," 765 F.2d at 1197 (Scalia, J., joined by Bork and Starr, JJ., dissenting), standing to mount challenges under the provisions of the McFadden Act. Congress did not intend such a result.

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goals and policies." *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 141 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978).

[46] Historically, only national and state banks and banking regulators have brought McFadden Act suits, and they have shown no hesitation to do so. *See, e.g., State Bank of Fargo v. Merchant Nat'l Bank & Trust Co.*, 593 F.2d 341, 345-46 (8th Cir. 1979) (seeking declaratory and injunctive relief to prohibit national bank from operating two customer electronic funds transfer centers); *State Bank of Rensselaer v. Heimann*, 619 F.2d 679, 683 (7th Cir. 1980) (challenging the opening of national bank branch facility); *First Bank & Trust Co. v. Smith*, 545 F.2d 752, 753 (1st Cir. 1976), *cert. denied*, 430 U.S. 931 (1977) (same); *Hempstead Bank v. Smith*, 540 F.2d 57 (2d Cir. 1976) (same); *Springfield State Bank v. National State Bank of Elizabeth*, 459 F.2d 712 (3d Cir. 1972) (same); *Ohio Bank & Savings Co. v. Tri-County Nat'l Bank*, 411 F.2d 801 (6th Cir. 1969) (same); *First-Citizens Bank & Trust Co. v. Camp*, 409 F.2d 1086, 1091 (4th Cir. 1969) (same). *See also* the cases cited *supra* at 28-29.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully submits that this Court should either (1) reverse the court of appeals insofar as it overruled the Comptroller's decision that the McFadden Act's branching provisions do not apply to discount brokerage offices or (2) vacate that aspect of the decision below in view of SIA's lack of standing with respect to its McFadden Act claims.

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